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No. 321

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (R. 194–200) is reported at 278 F. 2d 282. The decision and order of the Board (R. 37–46) are reported at 123 NLRB 1547.

JURISDICTION

The judgment below was entered on April 18, 1960 (R. 200–201). The time for filing a petition for certiorari was extended by order of Mr. Justice Black, dated July 8, 1960, to August 16, 1960. The petition was filed on August 12, 1960, and was granted on October 24, 1960, 364 U.S. 869 (R. 206). The jurisdiction

of this Court rests upon 28 U.S.C. 1254 and Section 10 (e) and (f) of the National Labor Relations Act (61 Stat. 146, 29 U.S.C. 160 (e) and (f)).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 53–54.

QUESTION PRESENTED

The union (petitioner) picketed the premises of the employer (respondent General Electric) with whom it was engaged in a labor dispute at gates used by the primary employees and also at a gate reserved exclusively for independent contractors and their employees, who were regularly working on those premises. The question presented is whether in the circumstances the Board had a reasonable basis for concluding that the picketing and related appeals at the contractors' gate exceeded the bounds of legitimate primary activity and were thus proscribed by Section 8(b)(4)(A) of the National Labor Relations Act.

STATEMENT

A. *The Board's findings*

The General Electric Company is engaged in the manufacture of household appliances at its plant, known as "Appliance Park," located about ten miles from Louisville, Kentucky (R. 38; 51, 57). The operation requires retooling and revamping of the manufacturing facilities for model changes as well as considerable maintenance, installation, and repair and

alteration work of various types (R. 13, 14, 38; 55–57). Because its maintenance division lacked either the necessary skills or sufficient manpower to perform these diversified functions, the company contracted with local concerns for the needed services (R. 38; 55, 56).

In July 1958, when the strike against General Electric (described *infra*) started, the company had outstanding agreements with twelve independent contractors. Six of the contractors had already commenced work on major projects, *e.g.*, construction of the mezzanine floor of a building, building a truck dock, erecting an air shelter, and rearranging a conveyor line (R. 39; 121, 122, 127–130, 131). Some of the contractors had maintained business relations with the company for a period of years—one, for example, for five or six years, with a force that varied from one to fifty men. At the time of the strike, some of the contractors' employees had been at the plant a year or more (R. 39; 80–81, 90, 100–104).

A large ditch surrounds the company's property so that access to the plant by vehicles is limited to five roadways across culverts; these are designated as "gates" and are numbered 2, 3, 3–A, 4, and 5 (R. 13, 36, 38; 51, 52, 65, 170–171). Rules of the company authorized its employees to use gates 2, 3, 4, and 5, but *not* gate 3–A, and limited the independent contractors, their employees and their suppliers to entry at gate 3–A (R. 17, 39, 40, 42; 51, 52, 54–55, 69–70, 72, 100, 103, 107, 113, 118–119, 187–188, 189). Over a period of years, jurisdictional and other labor disputes

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involving the contractors had resulted in numerous strikes at the plant. By restricting gate 3-A to those employees, the company sought to minimize the possibility of picketing at the regular entrances in the event that the contractors and their employees had disputes (R. 39; 66–67, 179–181).

In January 1954, written instructions were issued to the plant guards, limiting gate 3–A to independent contractors and their employees (R. 39; 59, 179–187). Unless recognized by the guards, passengers in a vehicle entering gate 3–A were required to identify themselves as contractor personnel, and a check was made against registration cards maintained at the guardhouse for this purpose (R. 40; 52, 55, 71, 107, 109–110).

In January 1958, a sign was posted at gate 3–A which read as follows:

GATE 3–A
FOR EMPLOYEES
OF CONTRACTORS
—ONLY—
G.E. EMPLOYEES
USE OTHER GATES

Similar signs have been posted at that entrance since 1953 (R. 40; 52–53, 170–171).

On July 27, 1958, petitioner union called a strike of the company's own employees, and pickets were stationed at all entrances to the plant including gate 3–A (R. 13, 38, 41; 49, 61, 133). The pickets carried signs reading (R. 41; 49, 132–134, 170–171):

LOCAL 761
ON STRIKE
G.E. UNFAIR

In addition to the picketing, oral appeals were made at gate 3–A to the employees of the independent contractors, importuning them not to cross the picket line. Thus, employees of Wehr Constructors seeking to enter at gate 3–A in order to report to work were told to "go home" (R. 41; 105–106). The driver of one car pointed to his contractor's identification sticker, but the pickets "didn't ask me anything, shook their heads, and that was all" (R. 78). When employees of another contractor, Heffernan, attempted to enter at gate 3–A, they were told by a picket they could not go in (R. 96–97). In order to get their tools, they were required to obtain a pass at the union hall (R. 97–99). An employee of a third contractor, Service Erection, was similarly stopped by the picket and told that he had to get a pass at the union hall. Later, a representative of Service, fearing its contract would be cancelled unless work was continued, conferred with representatives of petitioner in an effort to obtain permission for Service's employees to complete the project. After several meetings, the union representatives said that they would have to take the matter up with the executive board. Permission was not given and the employees of Service refused to resume work until conclusion of the strike (R. 87–89, 90–94).

Most, if not all, of the employees of independent contractors respected the picket line at gate 3–A (R. 17, 41; 63, 87, 89, 94, 132). Picketing at that entrance was discontinued on August 9, 1958, pursuant to a temporary restraining order issued by a federal district court under Section 10(e) of the Act (R. 41; 49, 133, 134).

B. *The Board's conclusions and order*

On these facts, the Board found that petitioner's picketing and related activity at gate 3–A, which was known to be set apart for the use of the independent contractors and their employees, was designed to enmesh the contractors in petitioner's dispute with General Electric. It concluded that, in the circumstances shown, the picketing at gate 3–A was not legitimate primary activity, but, rather, secondary activity proscribed by Section 8(b)(4)(A) of the Act. The petitioner was ordered to cease and desist from the unfair labor practices found and to post appropriate notices. (R. 37–46.)

C. *The decision of the court of appeals*

Upon its review of the record, the court of appeals concluded that the Board's findings were fully supported by the evidence and that the Board was warranted in holding, on the particular facts found, that the challenged activity of the union was directed peculiarly to the inducement of concerted action by neutral or secondary employees. On this basis, the court sustained the Board's determination that the case fell within the "range" of Section 8(b)(4)(A), and enforced its order. (R. 194–200.)

SUMMARY OF ARGUMENT

A. Read literally, Section 8(b)(4)(A) of the National Labor Relations Act would ban all strikes and picketing. However, it is well settled that "Congress did not seek, by § 8(b)(4), to interfere with the ordinary [or primary] strike" (*National Labor Relations*

Board v. *International Rice Milling Co.*, 341 U.S. 665, 672), but only to condemn the "secondary boycott" (*International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705).

Accordingly, in applying Section 8(b)(4)(A), the initial question is whether the challenged activity is "primary" or "secondary." Congress did not define these terms, but left to the Board the task of giving them content through the empiric process of administration. The Board's function is to accommodate "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692.

The line between permissible primary and illegal secondary activity is easy to draw when the primary employer and the neutral employer conduct their businesses at separate locations. It is far more difficult to draw when the primary employer and the neutral employer are at work on the same premises. Picketing at those premises will necessarily have a substantial impact on the neutral and his employees. But, unless the union can picket at the common project, its right to picket the primary employer may be illusory for that project is frequently his only place of business in the area of the dispute. The Board has sought to meet this problem with an eye to practicalities—by treating picketing at a common

work project as primary so long as every reasonable effort is made to confine it to the primary employer, and as secondary when there is a direct and purposeful effort to involve the neutral employer in the dispute.

The union assumes that its right to picket the premises of the primary employer in this case is an unqualified right. The Board believes, on the other hand, that it properly took into account the fact that independent contractors work at the premises on a regular basis. This fact lies at the root of its holding that the union's picketing at the General Electric premises exceeded the bounds of legitimate primary activity when the union extended its picketing and its appeals to a gate used exclusively by the employees of the neutral independent contractors. The Board's conclusion, we urge, represents a reasonable accommodation of conflicting interests.

B. The Board has long recognized that the right to engage in picketing in support of a labor dispute with the primary employer includes the right not only to appeal to the employees of the primary employer, but also "to influence third persons to withhold their business or services from the struck employer." *International Brotherhood of Teamsters, Local 807* (*Schultz Refrigerated Service*), 87 NLRB 502, 505 (1949). In order to afford the union an adequate opportunity to make these appeals, and yet at the same time to prevent the area of the dispute from becoming unduly enlarged, the Board, at an early date, adopted geography as one of the basic

tests of primary-secondary activity. Thus, picketing at the primary employer's plant was viewed as primary, and picketing at the premises of a neutral employer as secondary.

The geographic test was, at first, rigidly applied, and no differentiation was made in the situation where (as here) the neutral employees' contacts with the primary premises were regular and continuous rather than transitory. However, the Board did give consideration to the interests of the neutral employer in other situations where he shared premises with the primary employer. Thus, where the primary employer was a subcontractor who worked along with other contractors on a construction project, or where the primary employer's business was mobile and had temporarily moved to the premises of another employer, the Board concluded that "the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute." *Sailors' Union of the Pacific* (*Moore Dry Dock Co.*) 92 NLRB 547, 549 (1950). Accordingly, in these situations it was held that the union could lawfully picket at the shared premises if it confined its activity, so far as practicable, to the primary employer's business.

In 1951, in the *Rice Milling, Denver* and *Electrical Workers* cases, 341 U.S. 665, 675, 694, this Court held (a) that Section 8(b)(4)(A) did not interdict primary activity, but (b) that an accommodation had to be made in the construction project cases because of the regular and concurrent presence of both primary and secondary employees at the same location.

In the light of those holdings, the Board has concluded that there is no basis for a hard and fast distinction between the case where the primary employer has come on someone else's premises and the case where his own premises have become a common work site. In both situations, the practicalities may require, in a given case, that neither the right of the union, nor that of the neutral, shall be given unlimited scope.

C. On the facts of this case, the Board's order represents a reasonable accommodation of the competing interests involved. General Electric's Appliance Park was a regular work place for the contractors' employees, no less than for General Electric's employees. The picketing at these premises could therefore be expected to have far greater impact on the contractors' employees than it would on a deliveryman or serviceman making a brief appearance there. And the union's action in extending the picketing to the gate used exclusively by neutral employees and stopping those workers as they proposed to enter was bound to increase substantially the prospect of injury to the neutral employers. In these circumstances, the interests of the contractors were entitled to recognition at the General Electric premises. This can be done and still leave the union with adequate room for the exercise of its right to engage in primary activity against General Electric. Requiring the union to confine its picketing, so far as practicable, to General Electric and to refrain from action which focuses

upon neutral contractors at the site, permits it to continue to picket at the four other gates to the premises, where its appeal can still reach all of the areas which primary activity customarily reaches.

Contrary to petitioner's suggestion, the situation here is essentially similar to that in *Denver* and *Electrical Workers, supra.* There, as here, the same premises were the regular work site for a number of different employers and their employees. In these circumstances, neither the right of the union to engage in primary activity nor the right of the neutral employers to remain free of pressure can be deemed absolute. Nor can the construction project cases be realistically distinguished on the ground that there the neutral employers were not directly performing work for the primary employer on his own premises.

D. The Board's decision here is entirely consistent with the decision of this Court in *Rice Milling,* 341 U.S. 665. Here, the primary employer's premises were not only his work place, but also the regular work place of several neutral employers. In consequence, the picketing had more substantial impact on the neutral employees than if they had been the employees of suppliers who "happen[ed] to approach the picketed place of business" (341 U.S. at 673). Accordingly, it was appropriate to treat the General Electric premises not solely as a work site for the primary employer, as in *Rice Milling,* but as a common

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work site, and to make an accommodation for the rights of the neutrals at work there, as in *Denver* and *Electrical Workers.*

Nor is the Board's decision affected by the 1959 amendments to the Act which added a proviso to Section 8(b)(4) preserving the lawfulness of "any primary strike or primary picketing." The proviso does not define "primary," but merely sets forth in the statute the principle which has governed the decisions of the Board and the courts since Section 8(b)(4)(A) was first inserted in the Act in 1947. It remains the Board's duty, by the process of inclusion and exclusion, to draw reasonable and meaningful distinctions, on the basis of the particular facts involved, between primary and secondary activity. The practical accommodation of the competing interests involved—the right of the union to picket the primary employer and the right of unoffending neutral employers to be shielded from the controversy—calls for the application of an expert administrative judgment. Since the Board's decision reflects its experience, its appreciation of the complexities of the problem, its awareness of the Congressional policies to be served and a careful evaluation of the total factual situation, it has made an "allowable judgment." *Securities & Exchange Commission* v. *Chenery Corporation,* 332 U.S. 194, 209.

ARGUMENT

IN THE CIRCUMSTANCES OF THIS CASE, THE BOARD HAD REASONABLE BASIS FOR CONCLUDING THAT THE UNION'S CONDUCT AT THE GATE RESERVED EXCLUSIVELY FOR THE CONTRACTORS' EMPLOYEES VIOLATED SECTION 8(b)(4)(A) OF THE NATIONAL LABOR RELATIONS ACT

A. *Introduction*

Section 8(b)(4)(A) of the National Labor Relations Act[1] provides that it shall be an unfair labor practice for a labor organization:

> * * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person; * * *.

Read literally, this provision would ban all strikes and picketing. It is well settled, however, that "Congress did not seek, by § 8(b)(4), to interfere with the ordinary [or primary] strike" (*National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 672), but only to condemn the "secondary boycott" (*International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694,

[1] This case arises under the provision as it existed prior to its amendment in 1959, 73 Stat. 519, Sec. 704(a). As we point out *infra*, pp. 44–46, the 1959 modifications do not affect the decision herein.

705). Moreover, not all secondary boycotts are proscribed, but only those achieved by "the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods." *Local 1976, Carpenters Union* v. *National Labor Relations Board,* 357 U.S. 93, 100.

Accordingly, in applying Section 8(b)(4)(A), the threshold question is whether the challenged activity is "primary" or "secondary." Congress did not define these terms, which had a varying meaning at common law.[2] Instead, it left to the Board the task of giving content to the terms through the empiric process of administration. The Board's function is to accommodate "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 692.[3]

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[2] See Hellerstein, *Secondary Boycotts in Labor Disputes,* 47 Yale L.J. 341 (1938); 93 Cong. Rec. 4198–4199, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O. 1948), pp. 1106–1109.

[3] This passage from *Denver* negates petitioner's contention (Br. 45–46, 100–103) that the Board lacks power to give content to the terms primary and secondary by balancing the conflicting interests involved, because Congress, although it did not define those terms in the statute, did so in the legislative history of the Act. Furthermore, an examination of the legislative history (Br. 22–30) fails to reveal the clear guidelines which petitioner purports to find therein. To be sure, the

The line between permissible primary and illegal secondary activity is readily drawn where the primary employer and the neutral employer conduct their businesses at separate locations. In this situation, picketing and allied activity confined to the premises of the primary employer is permissible; its extension to the premises of the neutral employer is not. Compare *National Labor Relations Board* v. *Internatonal Rice Milling Co.*, 341 U.S. 665, with *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 184 F. 2d 60 (C.A. 10), certiorari denied, 341 U.S. 947.

The line is more difficult to draw where the primary employer and the neutral employer are at work on the same premises. Picketing at those premises will necessarily bear upon the neutral and his employees, for even picketing directed principally at the primary employer is bound to have some impact upon neutral employees at the site (see pp. 22–24, *infra*). But unless the union can picket at the common project, its right to picket the primary employer may be largely destroyed, for that project is frequently his only place of business in the area of the dispute. The Board has met this problem by treating picketing

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history reflects an intention to limit Section 8(b)(4)(A) to secondary boycotts and not to proscribe the primary strike. But the examples given of each are the classic cases where there is a geographic separation between the businesses of the primary employer and those of the neutral employer. Nothing in the legislative history explains where the line between primary and secondary activity is to be drawn in the situation here, where both employers are at work on the same premises.

at a common work project as primary so long as every effort is made to confine it to the primary employer, and as secondary when there is a further direct and purposeful effort to involve the neutral employer in the dispute.[4] Under this approach, if neutral employees stop work as a result of picketing at a common project, it becomes a question of fact in each case as to whether the stoppage occurred as an incident of picketing the primary employer (*i.e.*, the employees were induced to make common cause with the union in its struggle against the primary employer), or because the secondary employees were drawn into the dispute to a greater extent than primary picketing would necessarily involve.[5]

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[4] Thus, in *Sailors' Union of the Pacific* (*Moore Dry Dock Co.*), 92 NLRB 547 (1950), the Board, in finding that the picketing of the primary employer's ship at a repair dock owned by a neutral employer was primary, stated (p. 549):

> In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer. All these conditions were met in the present case. [Footnotes omitted.]

[5] See *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters* (C.A. 2), No. 26130, decided November 10, 1960, 47 LRRM 2085, 2086–2087; *Alpert* v. *United Steelworkers*, 141 F. Supp. 447, 452 (D. Mass.).

The latter was the situation in the *Denver* and *Electrical Workers* cases, *supra*. In both cases, the union had a dispute with a subcontractor who was working on a construction project along with the general contractor and other subcontractors; it picketed the project with signs describing the entire job as unfair, and, as a result of the picketing, the employees of the neutral contractors walked off. From the fact that the picketing did not clearly identify the primary employer and other evidence showing a dominant purpose to extend the dispute,[6] the Board found (and this Court sustained the finding) that the picketing was aimed at the neutral contractors. Hence, it exceeded the bounds of legitimate primary activity and fell within the ban of Section 8(b)(4)(A).[7]

Here, as in *Denver* and *Electrical Workers*, the picketing occurred at premises which were a work site not only of the primary employer, General Electric, but also of the neutral contractors, many of whom had been working there for several years prior to the present dispute. Moreover, as in those cases, there was cogent evidence that the Union did not confine

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[6] In *Denver*, prior to the picketing, the Council, comprising unions representing the employees of the neutral contractors, had decided to strike the project in order to enforce the provision of its bylaws barring union men from working with non-union men, and it was agreed that the picketing would constitute the strike signal (341 U.S. at 678–679). In *Electrical Workers*, the picketing was carried on at a time when none of the primary employer's employees were on the job (341 U.S. at 696; 181 F. 2d 34, 37 (C.A. 2)).

[7] See, also, *Local 74, Carpenters Union* v. *National Labor Relations Board*, 341 U.S. 707.

its picketing, insofar as possible, to General Electric, but engaged in a strong and deliberate effort to involve the neutral contractors in the controversy (see pp. 4–5, *supra*). Accordingly, the Board concluded, and the court below agreed, that, as in *Denver* and *Electrical Workers*, the union's activity at the gate reserved exclusively for the contractors and their employees violated Section 8(b)(4)(A).

It is petitioner's position, however, that *Denver* and *Electrical Workers* are inapposite because the neutrals there were not performing work for the primary employer directly, at his own premises (Br. 57–58). Thus, it argues that the right to engage in primary activity, which the Act safeguards, includes the right to conduct a campaign at the primary employer's premises to induce the employees of other employers who are permanently at work there to go on strike, even though the campaign is not part of the appeal to the employees of the primary employer. Accordingly, it concludes that it may not only lawfully picket the entire premises of the primary employer, but that it may also make every effort to induce the employees of the neutral employers not to cross or work behind the picket line. On this view, the requirement, applied in other common-work-site cases, that the picketing be conducted with due regard for the interests of neutrals steadily at work there, is inapplicable whenever the site belongs to the primary employer and the neutral contractors are engaged in doing work for him.

The Board believes, on the other hand, that the ownership of the premises is not important in drawing

the line between legitimate primary and illegal secondary activity at a common work site. Nor is it controlling that the work being done by the neutral is *for* the primary employer. The important consideration, in the Board's view, is whether a neutral employer uses the premises, along with the primary employer, in a substantial and continuous manner as a regular work place; if he does, his interests are entitled to protection there, no less than those of the primary employer.[8]

[8] The issue is not, as petitioner asserts (Br. 20–21), whether "the Board is empowered to declare that the only legitimate object of primary picketing at a manufacturing establishment is to induce employees and prospective employees of the primary employer to make common cause with the strikers or pickets." As we shall show, the Board recognizes that a picket line may legitimately appeal to the employees of neutral employers. The question is whether that appeal is made as an incident of picketing the primary employer, or as part of a purposeful effort to enmesh the neutral employers in the dispute. In the Board's view, all picketing and allied activity at the premises of the primary employer may ordinarily be regarded as making only an "incidental" appeal to neutral employees coming to those premises with deliveries or to perform services. However, the Board believes that where the neutral employees work on the premises in a regular manner the picketing, insofar as they are concerned, may exceed the "incidental" and become "secondary" if, instead of attempting to confine that activity to the primary employer, the union unnecessarily directs it at the neutral employers at work there. Petitioner, on the other hand, would treat as privileged even picketing expressly directed at those employers, merely because they happened to be on the primary employer's premises and performing work for him there.

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B. *The evolution of the Board's approach*

The Board recognized, at an early date, that the right to engage in picketing and allied activity in support of a labor dispute with the primary employer includes the right not only to appeal to the employees of the primary employer, but also "to influence third persons to withhold their business or services from the struck employer." *International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 NLRB 502, 505 (1949).[9] The problem was to afford the union an adequate opportunity to make these appeals, and yet to prevent the area of the dispute from becoming unduly enlarged, to the detriment of netural employers. Since the primary employer's own premises ordinarily furnish the union with ample access to those working for, supplying and servicing the primary employer's business, there is no justification, in the ordinary case, for extending the union's activity to other premises. Accordingly, the Board adopted geography as one of the basic tests for determining whether the activity was to be characterized as primary or secondary.

Thus, picketing at the primary employer's plant and appeals by the pickets to the employees of suppliers not to make deliveries there were viewed as legitimate primary activity.[10] Similarly, appeals or

[9] See, also, *International Brotherhood of Teamsters, Local 179 (Alexander Warehouse Sales Co.)*, 128 NLRB No. 105, August 25, 1960.

[10] *International Brotherhood of Teamsters, Local 201 (International Rice Milling Co.)*, 84 NLRB 360 (1949), affirmed, *sub nom. National Labor Relations Board* v. *International Rice*

directions, though away from the picket line, not to make pick-ups or deliveries at the primary premises were viewed as primary, since they invited action only at those premises.[11] On the other hand, where the union went to the premises of a neutral employer and there sought, by picketing and other means, to induce the neutral's employees not to handle products manufactured in the primary employer's plant, the activity was viewed as having the secondary object proscribed by Section 8(b)(4)(A).[12]

The geographic test was, at first, rigidly applied, and no differentiation was made in the situation where, as here, the neutral employees do not merely have transitory contracts with the primary premises, but work there on a regular basis. Thus, in *Oil Workers International Union, Local 346 (The Pure Oil Co.)*, 84 NLRB 315 (1949), the Board found that picketing of Standard Oil at its dock was primary notwith-

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Milling Co., 341 U.S. 665; *International Brotherhood of Teamsters, Local 87 (DiGiorgio Wine Co.)*, 87 NLRB 720 (1949), affirmed, *sub nom. Di Giorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 648–649 (C.A.D.C.), certiorari denied, 342 U.S. 869.

[11] *Newspaper and Mail Deliverers' Union (Interborough News Co.)*, 90 NLRB 2185 (1950); *Chauffeurs, Local 200 (Milwaukee Plywood Co.)*, 126 NLRB No. 80, enforced, *sub nom. Milwaukee Plywood Co.* v. *National Labor Relations Board*, (C.A. 7), decided December 20, 1960, 47 LRRM 2291.

[12] *Printing Specialties Union, Local 388 (Sealright Pacific, Ltd.)*, 82 NLRB 271 (1949), Section 10(l) injunction sustained, 171 F. 2d 331 (C.A. 9); *United Brotherhood of Carpenters (Wadsworth Building Co.)*, 81 NLRB 802 (1949), enforced, *sub nom. National Labor Relations Board* v. *United Brotherhood of Carpenters*, 184 F. 2d 60 (C.A. 10), certiorari denied, 341 U.S. 947.

standing the fact that it also induced Pure Oil's employees, who were performing work for their employer at that dock, to stop work.[13] And in *United Electrical Workers, Local 813 (Ryan Construction Corp.)*, 85 NLRB 417 (1949), the Board found that picketing of the premises of the primary employer, Bucyrus, was permissible even when extended to a gate which had been established for the use of the employees of Ryan, an independent contractor who was performing construction work for Bucyrus.[14]

The Board did, however, give consideration to the interests of the neutral employer in other situations where he shared premises with the primary employer. Where the primary employer was a subcontractor who worked along with other subcontractors and the general contractor on premises belonging to a third party, or where the primary employer's business was mobile and had temporarily moved to the premises of another employer (*e.g.*, a ship in drydock or a truck making deliveries at retail stores), the Board concluded that "the right of neither the union to picket nor of the secondary employer to be free from picket-

[13] There was evidence that the work performed by Pure Oil employees would have been done by Standard's employees but for the strike against Standard (84 NLRB at 316-317). Cf. *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y.).

[14] In addition to relying on the circumstance that the picketing was conducted at the primary employer's premises with signs directed at Bucyrus, the Board pointed out that, "although only Ryan employees and suppliers had in fact used the Ryan gate before picketing started, Bucyrus employees could always also have entered this gate in order to reach their job location" (85 NLRB at 419).

ing can be absolute." *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549 (1950). The union, it was concluded, could lawfully picket at the shared premises only if it clearly indicated that its dispute was only with the primary employer and sought to confine its activity, so far as practicable, to the primary employer's business.

In *Moore Dry Dock*, the Board formulated a number of criteria for determining whether the union's picketing in these "shared-premises" cases was primary or secondary (see n. 4, *supra*). The courts of appeals, although approving these criteria, made clear that they were merely evidentiary guides and did not preclude the consideration of other relevant factors.[15] The approach was this: if the union limited its picketing to occasions when the primary employer was on the same premises, used signs which referred only to the primary employer, and did not make any overt appeals to the neutral employers or their employees, the picketing would be found to have a primary object;[16] on the other hand, if the picket signs characterized the entire job as unfair,[17] the picketing was carried on after the primary employer had left the

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[15] See *Sales Drivers, Local 859* v. *National Labor Relations Board*, 229 F. 2d 514 (C.A.D.C.), certiorari denied, 351 U.S. 972; *National Labor Relations Board* v. *General Drivers, Local 968*, 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914.

[16] *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950); *International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 NLRB 502 (1949).

[17] See the *Denver* and *Electrical Workers* cases, discussed p. 17, *supra*.

premises,[18] or there was other evidence that the union activity was strongly directed at the neutral employer and his employees,[19] the picketing would be found to have a secondary object.

After this Court's decisions, in 1951, in the *Rice Milling, Denver* and *Electrical Workers* cases, *supra*, the Board re-evaluated its approach to common work projects and concluded that it could not draw a hard and fast distinction between the situation where the primary employer has come onto someone else's premises and that where his own premises become a common work site.[20] This view is reflected in a series of cases.

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[18] *International Brotherhood of Teamsters, Local 807 (Sterling Beverages, Inc.)*, 90 NLRB 401 (1950); *National Labor Relations Board* v. *Service Trade Chauffeurs, Local 145*, 191 F. 2d 65, 199 F. 2d 709 (C.A. 2). Cf. *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900 (C.A. 2), certiorari denied, 351 U.S. 962.

[19] *Truck Drivers, Local 728 (Campbell Coal Co.)* v. *National Labor Relations Board*, 249 F. 2d 512 (C.A.D.C.), certiorari denied, 355 U.S. 958; *National Labor Relations Board* v. *Truck Drivers, Local 728 (National Trucking Co.)*, 228 F. 2d 791 (C.A. 5); *National Labor Relations Board* v. *Seafarers' International Union*, 273 F. 2d 891, 894 *ff.* (C.A. 5), certiorari denied, 364 U.S. 816; *National Labor Relations Board* v. *United Steelworkers*, 250 F. 2d 184 (C.A. 1); *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters* (C.A. 2), No. 26130, decided November 10, 1960, 47 LRRM 2085; *National Labor Relations Board* v. *International Hod Carriers, Local 1140* (C.A. 8), No. 16538, decided December 22, 1960, 47 LRRM 2345. See, also, *Local 74, Carpenters Union* v. *National Labor Relations Board*, 341 U.S. 707.

[20] In affirming the Board's holding in *Rice Milling* that picketing and allied appeals at the primary employer's plant was not proscribed by Section 8(b)(4)(A), this Court stated that

Thus, in *Hoosier Pete*,[21] Floyd owned truck tractors which he used to haul gas and oil for Hoosier Pete, in the latter's tank trailers, to filling stations owned by Hoosier Pete. Floyd kept his tractors and maintained a regular place of business at one of Hoosier Pete's stations. The union, having a dispute with Floyd, picketed the premises used jointly by Floyd and Hoosier Pete. The messages on the pickets' signs were not limited to Floyd, and the pickets made direct attempts to stop truckdrivers from "gassing up" at Hoosier Pete's pumps. The Board—finding that Floyd and Hoosier Pete were independent entities, and that the picketing was aimed not only at Floyd, but also at the neutral, Hoosier Pete—ruled that the fact that Floyd maintained a regular place of business on the premises involved did not, in and of itself, protect the direct action against Hoosier Pete and therefore concluded that the union had violated Section 8(b)(4)

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the "limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive" (341 U.S. at 671). Moreover, in sustaining the finding of a violation in *Denver*, the Court rejected the contention, advanced by the union and accepted by the dissenting Justices, that, since the picketing was confined to the job where the labor dispute arose and did not spread to another front, it was primary activity (see 341 U.S. at 693). Finally, Judge Clark, in dissenting in *Electrical Workers*, 181 F. 2d 34 (C.A. 2), affirmed, 341 U.S. 694, pointed out that to have one rule for enmeshed employment in the building and construction situation and another for the situation in *Ryan*, *supra*, was anomalous (181 F. 2d at 41). And see *United Brick & Clay Workers* v. *Deena Artware*, 198 F. 2d 637, 641-643 (C.A. 6), certiorari denied, 344 U.S. 897.

[21] *Chauffeurs, Local No. 135 (Hoosier Petroleum Co.)* 106 NLRB 629 (1953).

(A). The Board's order was enforced by the Seventh Circuit.[22]

In *PBM*,[23] an insurance company owned the premises and acted as its own general contractor in constructing homes on the land, employing some nonunion men directly and subcontracting the balance of the work to union subcontractors. The union picketed the job site with signs characterizing the entire job as unfair, causing the employees of the union subcontractors to walk off the job. Concluding that the situation was essentially like that in *Denver*, notwithstanding the fact that the dispute was with the general contractor who owned and controlled the premises, the Board found that the picketing was directed at the union subcontractors and contrary to Section 8(b)(4)(A). The Tenth Circuit agreed.[24]

In *Crystal Palace*,[25] Local 648 had a dispute with a number of the shops located in a large market building. Some of these shops were owned by Long, who also owned the building, and some were owned by persons who leased space from Long. The union placed pickets not only in front of market entrances which were adjacent to the shops involved in the dis-

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[22] *National Labor Relations Board* v. *Chauffeurs, Local 135*, 212 F. 2d 216 (C.A. 7).

[23] *Local Union No. 55, Carpenters (Professional and Business Men's Life Insurance Co.)*, 108 NLRB 363 (1954).

[24] *National Labor Relations Board* v. *Local Union No. 55*, 218 F. 2d 226 (C.A. 10). See, also, *John A. Piezonki d/b/a Stover Steel Service* v. *National Labor Relations Board*, 219 F. 2d 879 (C.A. 4); *General Teamsters, Local 249 (Crump, Inc.)*, 112 NLRB 311 (1955).

[25] *Retail Fruit & Vegetable Clerks' Union, Local 1017 (Crystal Palace Market)*, 116 NLRB 856 (1956).

pute, but also in front of those which served neutral shops. Moreover, it enlisted the aid of Local 1017, which represented the employees of the latter shops. As a result, those employees refused to cross the picket line and to perform work for their employers. The Board found that the picketing was substantially directed at the neutral shop owners and came within the ban of Section 8(b)(4)(A). Answering the contention that the rules applicable to common situs cases—which require the union to "exercise its right to picket with restraint consistent with the right of neutral employers to remain uninvolved in the dispute"[26]—ought not be applied because the picketing occurred at the primary employer's premises, the Board stated (116 NLRB at 859):

> We believe * * * that the foregoing principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer. We can see no logical reason why the legality of such picketing should depend on title to property. The impact on neutral employees of picketing which deviates from the standards outlined above is the same whether the common premises are owned by their own employer or by the primary employer.[27]

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[26] *Retail Fruit & Vegetable Clerks Union, Local 1017* v. *National Labor Relations Board*, 249 F. 2d 591, 599 (C.A. 9).

[27] The Board added (116 NLRB at 859) that, to the extent that its earlier decision in *Ryan* was inconsistent, it was no longer adhering to that decision. See, also, *Local No. 36, International Chemical Workers* (*Virginia-Carolina Chemical Corp.*), 126 NLRB No. 117, March 2, 1960, enforced (C.A.D.C.), January 17, 1961, petition for certiorari pending, No. 680, this term.

The Board's order was enforced by the Ninth Circuit.[28]

The approach illustrated by the foregoing cases was then applied to the situation presented here, *i.e.*, where a neutral employer and his employees are engaged in work on the primary employer's premises in a continuous and substantial manner, making it in substance their regular work place. Here, as in other shared-work situations, the Board has undertaken to determine whether the picketing was confined, so far as practicable, to the primary employer's business, or whether a direct and substantial attempt was made to extend the dispute to the neutral and his employees even though the extension did nothing to facilitate the appeal to the primary employees. In the instant case and others like it, persuasive evidence of the unnecessary extension was furnished by the circumstance that there was a separate gate on the premises used exclusively by the neutral employers and their employees, and the union had extended its picketing and related activity to that gate.[29]

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[28] *Retail Fruit & Vegetable Clerks Union, Local 1017* v. *National Labor Relations Board*, 249 F. 2d 591 (C.A. 9).

[29] In addition to the instant case, see, *e.g.*, *Local No. 36, International Chemical Workers* (*Virginia-Carolina Chemical Corp.*), 126 NLRB No. 117; *United Steelworkers of America* (*Phelps Dodge Refining Corp.*), 126 NLRB No. 168. See, also, *Atomic Projects & Production Workers* (*New Mexico Building Branch, Associated General Contractors*), 120 NLRB 400, 403 *ff* (1958), enforced, *sub nom. Office Employees International Union* v. *National Labor Relations Board*, 262 F. 2d 931 (C.A.D.C.).

Other evidence, of course, may point to the same conclusion. Thus, in *Union de Trabajadores (Gonzales Chemical Industries, Inc.)*, 128 NLRB No. 116, August 26, 1960, a contractor, Lummus, was employed by a manufacturer, Gonzales, to perform construction work at Gonzales' premises that was expected to take more than six months. Lummus, who had no regular place of business in Puerto Rico, where Gonzales' plant was located, employed approximately 90 people for this work; they reported for work at times different from Gonzales' employees and wore helmets which were different in color. During the course of a primary strike and picketing against Gonzales, the union used signs which did not identify Gonzales as the target of its dispute; the pickets, in addition, orally induced employees of Lummus to refuse to work. Although the employees of Gonzales and Lummus used a single entrance, the Board found a violation of Section 8(b)(4)(A) because of the evidence of activity calculated to unnecessarily enmesh Lummus in the dispute. The Board stated (slip op. pp. 3–4):

> The Act reflects the "dual congressional objectives of preserving the right to labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own" [quoting from *Denver*, p. 14, *supra*]. By its *Moore-Drydock* decision, the Board has sought to accommodate these dual statutory objectives in a reasonable and practicable manner in com-

mon situs cases. While the *Moore Drydock* case itself was one in which the picketing occurred at the premises of a secondary employer, the rule evolved has been applied by the Board in cases where the picketing was conducted at the situs of the primary employer's operations at which the neutral employer also was engaged [citing *Crystal Palace* and *PBM, supra*]. No persuasive reason was apparent to the Board in those cases for permitting the legality of picketing to depend on where the title to the property was vested, and we do not now see any logical reason for holding otherwise. Indeed, upon reconsideration of this matter, we are again convinced that the protection of the Act's so-called secondary boycott provisions should be as available to the secondary or neutral employer in the position of Lummus who is engaged in work for a relatively extended period of time at the premises of another as to the neutral employer confined to a permanent business site who finds himself in the middle of a labor dispute involving another employer. Application of the secondary boycott provisions to cases involving neutral employers in both the aforementioned situations would obviously effectuate the Act's purpose of "shielding unoffending employers from pressures in controversies not their own." At the same time, without unnecessarily enmeshing neutral employers in the disputes of others, the union is left free under *Moore-Drydock* criteria effectively to exert its pressures on the employer with whom it is in dispute * * *.

In sum, it is the Board's view that, when union ivity occurs at, or in connection with, premises ich the primary employer alone occupies, the right the union to engage in primary activity may be en unlimited effect. Hence, all union attempts, by keting and allied means, to cut off deliveries, pick-s, and employment at the primary employer's plant l be regarded as primary and outside the purview Section 8(b)(4)(A). Similarly, where union ac-ity occurs at premises occupied solely by a neutral ployer, the right of the neutral to be free of pres-re in disputes not his own may be given unlimited ect. Hence, any union activity there, designed to luce the neutral's employees not to handle or work the primary employer's products, will be regarded secondary and within Section 8(b)(4)(A). here, however, the primary employer and the neu-l employer are at work on the same premises—espective of the ownership of those premises and espective of whether the neutral employer is per-ming work directly for, or merely in conjunction h, the primary employer—the practicalities may be h that neither the right of the union nor of the tral may be given unlimited scope. The union, these circumstances, may engage in picketing and ed activity at the common premises so long as it dertakes to confine its picketing, so far as possible, he primary employer's operation.

C. *The Board's approach, as applied to the facts of this case, achieves a reasonable accommodation as between the right of the union to picket the primary employer and the right of the neutral employer to remain uninvolved in the dispute*

As noted in the Statement, *supra*, General Electric's Appliance Park plant consists of 13 buildings located on about 1,000 acres of land. Vehicles can enter and leave the premises by 5 roadways across culverts, which are called "gates." At the time of the strike, in June 1958, the company employed about 10,500 employees, including about 7,600 production and maintenance employees represented by petitioner.

In addition, the company had contracts with 12 independent contractors for maintenance and alteration work, 6 of whom had actually started on various major projects. One contractor, R. J. Heffernan Company, had been at Appliance Park "approximately 5 to 6 years, practically regular," employing a work force that varied from 1 to 50 men. When the strike began, some of its employees had been at the plant continuously for a year or more. Three other contractors had worked at the plant for a period of 2 to 2½ years. The contractors' employees reported to the plant daily and worked there all day long. They had also been assigned lockers, tool boxes and parking spaces on a permanent basis.

In these circumstances, Appliance Park was a regular work place for contractors' employees, no less than for General Electric's employees. If a picket line were established at the premises, they would have to cross it every day. From their standpoint, the

icket line at the General Electric premises was much
ie same as though the union had picketed premises
here they alone worked. Contrary to petitioner
Br. 98–99), the picketing could therefore be ex-
ected to have far greater impact on the contractors'
nployees than it would on a deliveryman driving
p to the plant to make a pick-up or delivery, or a
rviceman appearing briefly to make a repair. Per-
ons having only a fleeting or occasional contact with
ie plant would not be likely to view the picketing
s aimed at their employers. On the other hand,
iere is good reason to apprehend that continued
icketing occurring at the place where neutral em-
loyees regularly go to and from work, focused upon
iose employees, might cause substantial damage to
ie business of third persons (the independent con-
ractors) not themselves concerned in the dispute.
Ve submit that Section 8(b)(4)(A) embraces a pur-
ose to relieve the contractors, as neutrals, of this
ype of pressure.[30]

To be sure, since the picketing occurred at General
Electric's premises, an accommodation has to be made
or the union's right to picket the company. Our
oint is that the substantial interests of the neutral
ontractors can be protected, without serious im-
airment of the union's right to engage in primary
ctivity against General Electric. Thus, requiring

[30] As Senator Taft stated, Section 8(b)(4)(A) was intended
protect "the business of a third person who is wholly un-
ncerned in the disagreement between an employer and his
nployees" (93 Cong. Rec. 4198, Leg. Hist. of the L.M.R.A.,
47, p. 1106).

the union to confine its picketing, so far as practicable, to General Electric and to take no action which would suggest that the dispute extended to the contractors, permits the union to continue to picket at the four other gates to the premises. By this picketing, it could carry an appeal to support the union in its dispute with the company, reaching not only the non-striking General Electric employees but also others, including deliverymen and even the contractors' employees (who would not be oblivious to the fact that the premises were being picketed).

The situation here is substantially similar to that in *Denver* and *Electrical Workers,* pp. 17–18, *supra.* There, as here, the same premises were the regular work site for a number of different employers and their employees. In these circumstances, this Court concluded, neither the right of the union to engage in primary activity nor the right of the neutral employers to remain free of pressure could be absolute. The union could picket the contractor with whom it had a dispute at the common work site, provided it made every effort to confine its activity to that contractor; but, if it focused some of its efforts upon implicating other contractors in the dispute, to that extent it violated Section 8(b)(4)(A).

Denver and *Electrical Workers* cannot be distinguished on the ground that the relationship between contractors on a building and construction project is materially different from that between General Electric and its contractors at Appliance Park. Petitioner says (Br. 57–58; see, also, *Amici* Br. 23) that

in the building and construction situation the various contractors on the project are not doing work for each other but for some third person, whereas here the contractors are doing work directly for the primary employer, General Electric. But, considering the interdependence of the various crafts on the typical construction project, it is highly unrealistic to say that the work of one does not benefit or involve the others. For example, the electrical subcontractor may not be able to wire the building unless the carpenter subcontractor puts in studs; if the union has a dispute with the former and, in furtherance of its cause, strikes the latter, there has been an interruption of work which directly involves the primary employer to the same extent as here. The difference is that here the disruption has occurred on premises owned by the primary employer whereas in the example given the premises are owned by a third party—a distinction which the union concedes is not material (Br. 91–92). Indeed, as the *PBM* case, discussed *supra,* p. 26, illustrates, where the primary dispute is with the general contractor who owns the land, and the union strikes his subcontractors, a situation identical to that presented here may arise in the building and construction situation.[21] In other words,

[21] Petitioner concedes (Br. 62), that, if the union had a dispute with one of the contractors instead of General Electric, the latter could properly have restricted the picketing at its premises to a separate gate, for the company's employees "perform no service for the contractor." This distinction seems particularly artificial in this case, where, as petitioner notes (Br. 75), the contractors' employees were performing work within the General Electric plant. In this situation, a work

the principle of the *Denver* case applies to injuries suffered by subcontractors in consequence of a strike against the general contractor no less than to the situation where the subcontractor is the primary employer and the general contractor the unoffending secondary employer.

Moreover, the propriety of union action in a "common-situs" situation does not turn on whether the neutral employees are merely being asked to discontinue work or services which they are doing for the primary employer at that location, or all work or services (Pet. Br. 48–49). Petitioner's classification of cases (Br. 50–61) overlooks those in which violations of Section 8(b)(4)(A) have been sustained in circumstances where the primary employees were present on the premises with the neutral employees, and direct efforts were made only to induce the latter not to assist the primary employer, as by loading or unloading his truck, using materials which he had delivered, etc.[35] Violations have been found in

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stoppage by the company's employees could impede the tasks of the contractors' employees, no less than the instant strike of the company's employees could affect the work of the contractors' employees. In short, in both cases, interruption of the work of the neutral employees would, "of itself, exert * * * direct economic pressure on the primary employer" (Br. 49). Accordingly, if a distinction is to be drawn between the two cases, as petitioner contends, it can only be on the concededly irrelevant ground that here the primary employer owns the premises where the picketing occurs, whereas in the hypothetical case he does not.

[35] See *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, 96–97 (the refusals to handle American Iron freight); *National Labor Relations Board* v. *Local 135*,

this situation (upon evidence showing that the union was directing its pressure at the neutral employers rather than merely seeking to enlist their employees as an incident of picketing the primary employer) because Section 8(b)(4)(A) bans partial no less than total refusals to work (cf. Pet. Br. 41, n. 19).

Congress, in enacting Section 8(b)(4)(A), deliberately rejected such common law tests as "unity of interest" and "community of interest," which would have deprived an employer of his neutral status if he handled the primary employer's products or furnished services to him.[33] Instead, it enacted a ban against all strike

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Teamsters, 267 F. 2d 870 (C.A. 7), certiorari denied, 361 U.S. 914; *Truck Drivers, Local 728 (Genuine Parts)* v. *National Labor Relations Board*, 265 F. 2d 439 (C.A. 5), certiorari denied, 361 U.S. 917; *Printing Specialties and Paper Converters Union, Local 388* v. *Le Baron*, 171 F. 2d 331, 333 (C.A. 9) (although the truck was that of an independent trucker, the trucker was hired by the primary employer to circumvent the picket line at his plant and thus was "allied" with him, 82 NLRB at 278); *National Labor Relations Board* v. *Brewery and Beer Distributor Drivers, Local 830*, 281 F. 2d 319 (C.A. 3); *Brewery and Beverage Drivers, Local 67* v. *National Labor Relations Board*, 220 F. 2d 380 (C.A.D.C.), enforcing 107 NLRB 299; *Truck Drivers, Local 728 (Campbell Coal Co.)* v. *National Labor Relations Board*, 249 F. 2d 512 (C.A.D.C.), certiorari denied, 355 U.S. 958; *National Labor Relations Board* v. *United Steelworkers of America, Local 5246*, 250 F. 2d 184 (C.A. 1); *National Labor Relations Board* v. *International Hod Carriers, Local 1140* (C.A. 8), No. 16,538, decided December 22, 1960, 47 LRRM 2345. See, also, *Amalgamated Meat Cutters, Local 88* v. *National Labor Relations Board*, 237 F. 2d 20 (C.A.D.C.), certiorari denied, 352 U.S. 1015 (refusal of secondary employees to buy meat from primary employer's salesmen).

[33] See *National Labor Relations Board* v. *Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584, 587 (C.A. 2); *Printing Spe-*

action directed against employers who were independent of the primary employer and could not affect the underlying dispute except by discontinuing normal business relations with the primary employer.[34] The

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cialties & Paper Converters Union, Local 388 v. *LeBaron*, 171 F. 2d 331, 334 (C.A. 9); 93 Cong. Rec. 4197–4198, Leg. Hist. of the L.M.R.A., 1947, pp. 1104–1106. Cf. *Metal Polishers (Climax Machinery Co.)*, 86 NLRB 1243, 1251–1252 (1949).

Petitioner's attempt (Br. 25–29, 40–41, 49) to distinguish the typical secondary boycott situation (*i.e.*, where B, who sells or processes A's products, is struck in order to force a discontinuation of business relations with A) from the situation here (*i.e.*, where B's employees, who perform services for A in the presence of A's employees, are induced to stop that work) is not persuasive. It is difficult to perceive how the economic pressure exerted on A in the former case is any different than it is in the latter (Br. 49). Of even more importance, the plight of B is the same in both cases. He is unable to grant the union's ultimate demands (which relate to the conditions of employment of A's employees); the only thing he can do in that connection is to exert pressure on A to grant those demands, by ceasing to do business with him until he gives in. Stated otherwise, the only justification in both cases for extending the union's dispute to B is that B and A derive benefits from doing business with each other—a justification which Congress concluded was not sufficient.

[34] As Senator Taft pointed out (93 Cong. Rec. 4198, Leg. Hist. of the L.M.R.A., 1947, p. 1106):

> It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.

Although the Board has rejected common law tests in drawing the line between primary and secondary activity, it has, of course, recognized that there are certain situations where the

contractors here fall in this category. They were independent of General Electric; the work which they were performing was not work which General Electric itself would have performed but for the strike; and they were unable to influence the outcome of the union's dispute with General Electric except by discontinuing business relations with General Electric.

At bottom, the union's contention that its action against the contractors was privileged because they were doing work directly for the primary employer, General Electric, is but a variant of the argument that was rejected in *Denver* and *Electrical Workers, viz.*, Section 8(b)(4)(A) was only applicable to the situation where the union had extended its activity from the job which gave rise to the dispute "to another front" (341 U.S. at 693, dissenting opinion). As Judge Learned Hand, whose opinion in *Electrical Workers* was affirmed by this Court, stated with reference to this contention (181 F. 2d at 37):

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relationship between the secondary employer and the primary employer is so close that the former is not in fact a neutral "wholly unconcerned" in the primary dispute. For example, where the secondary employer has allied himself with the primary employer by knowingly doing work which the latter would have done but for the dispute (see *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y.); *National Labor Relations Board* v. *Business Machine Mechanics Conference Board*, 228 F. 2d 553, 557–559 (C.A. 2), certiorari denied, 351 U.S. 962), or where the secondary employer is owned and controlled by the primary employer and is thus not truly independent of him (see *J. G. Roy & Sons Co.* v. *National Labor Relations Board*, 251 F. 2d 771, 773–774 (C.A. 1); *Milwaukee Plywood Co.* v. *National Labor Relations Board* (C.A. 7), December 20, 1960, 47 LRRM 2291, 2292).

> The situation was therefore within § 8(b)(4)(A), unless it makes a difference that Giorgi, upon whom the "concerted refusal" indirectly impinged, was at work on the same job with Langer with whom the union had its dispute. In short, is a secondary boycott limited to pressure upon third parties who are not engaged in the same venture with the unyielding employer? We can see no basis for such a distinction. The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands. We cannot see why it should make any difference that the third person is engaged in a common venture with the employer, or whether he is dealing with him independently. The phrase, "doing business," would ordinarily cover doing any business which the third party is free to discontinue, regardless of whether he is merely supplying materials to the employer, or has subcontracted with him to perform part of a work which the third party has himself contracted to do. The third party cooperates as truly with one to whom he furnishes materials as with a subcontractor. * * *

See, also, this Court's opinion in *Denver,* 341 U.S. at 689–690.

D. *Petitioner's contentions do not impair the validity of the Board's conclusion in this case*

1. Contrary to petitioner's view (Br. 70–75), the Board's decision here is not inconsistent with *Na-*

tional Labor Relations Board v. *International Rice Milling Co.*, 341 U.S. 665. In that case, the Court held that Section 8(b)(4)(A) did not proscribe picketing and picketers' appeals, at the primary employer's plant, which induced a customer's truck, driven by two employees, to drive away without picking up supplies for their employer. The Court concluded that "Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike," and that the conduct which occurred—*i.e.*, the inducement of "individual employees of neutral employers only as they *happen to approach* the picketed place of business"—was a characteristic incident of a primary strike (341 U.S. at 672, 673; emphasis added).[35] The Board has consistently followed this ruling and recognized as legitimate primary activity all efforts to secure observance by neutral employees of a picket line placed at premises solely owned and occupied by the primary employer.

The situation in the instant case is significantly different from that in *Rice Milling;* here, the primary employer's premises were not only his work place,

[35] In *Rice Milling*, the Court expressed this conclusion in these terms: "[T]he applicable proscriptions of § 8(b)(4) are expressly limited to the inducement or encouragement of *concerted* conduct by the employees of the neutral employer. That language contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets' request to a driver of a single truck to discontinue a pending trip to a picketed mill" (341 U.S. at 670–671). However, in the companion *Denver* case, it described the conduct in *Rice Milling* as "no more than *was traditional and permissible in a primary strike*" (341 U.S. at 687, emphasis added).

but also the regular work place of several neutral employers. Accordingly, it was appropriate to treat the General Electric premises, not solely as a work site for the primary employer, as in *Rice Milling*, but as a common work site, and to make an accommodation for the rights of the neutrals at work there, as in *Denver* and *Electrical workers*.

To be sure, *Rice Milling* holds that Section 8(b)(4)(A) must be read as preserving the right of the union to do what is "traditional" in a primary strike. But the instant case does not present a traditional or a typical problem. Moreover, one could hardly read into *Rice Milling* a view that accommodation is not to be made in common-situs cases between a union's right to engage in primary activity and the rights of neutral employers. The *Denver* and *Electrical Workers* cases were decided on the same day as *Rice Milling*.[34]

2. Petitioner's position is not aided by the concluding proviso to Section 8(b)(4):

> *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the

[34] Nor can the citation of *Ryan* (p. 22, *supra*) in *Rice Milling* (341 U.S. at 672, n. 6) be regarded as a holding that the separate gate picketing here is necessarily an attribute of legitimate primary activity. There was no attempt by the Court to examine the facts of *Ryan*. It was merely cited, along with several other cases, in support of the general proposition—which is stated, in somewhat different terms, in the Board's opinion in *Ryan*—that Section 8(b)(4) was not intended to "interfere with the ordinary strike." See *Retail Fruit & Vegetable Clerks' Union, Local 1017 (Crystal Palace Market)*, 116 NLRB 856, 859–860 (1956).

> premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: * * *

It is suggested (Br. 38) that, in this proviso, "Congress demonstrated that it understood that preservation of traditional strike pressure meant that a striking union would remain free to induce employees of neutral employers to refuse to perform services 'upon the premises' of the struck employer." Although neither the Board nor the courts have had occasion to delineate the precise scope of this proviso,[11] it is clear that it does not define what constitutes primary activity; at most, it undertakes to protect, under certain circumstances, the refusal of neutral employees to cross a picket line which has otherwise been found to be primary. If the proviso were read as privileging every picket line at the premises of an employer whose employee representative had called a strike, it would have the effect of removing from the ban of Section 8(b)(4)(A) picketing in the familiar common situs situations where there had been no effort to confine the picketing to the primary employer in accordance with the *Moore-*

[11] But see the report of the Trial Examiner in *Interborough News Co.*, 90 NLRB 2135, 2146–2149 (1950).

Dry Dock criteria [38]—a result which petitioner does not urge.

Nor can guidance be derived from the 1959 amendments to the Act (see Pet. Br. 46, 72–73; *Amici* Br. 29–36) in determining whether the picketing involved here is to be deemed primary or secondary. In that year, Congress amended Section 8(b)(4)(A) (renumbering it 8(b)(4)(B)) to cover the inducement, not only of employees, but of "any individual employed by any person engaged in commerce." It also deleted the requirement that a "concerted" work stoppage be induced, and added the following proviso (Pet. Br. 4):

> *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

Petitioner contends that this proviso, particularly in the light of its legislative history, shows that, at least under the 1959 amendments (which govern the validity of the Board's order here because it looks to the future), Congress made clear that it did not intend to outlaw picketing at primary premises.

The phrase "primary strike or primary picketing" in the new proviso does not help in resolving the issue in this case. There is no disagreement that Congress intended in the original Section 8(b)(4)(A) to outlaw "secondary boycotts," and not "primary strikes" (pp. 13–14, *supra*). The new proviso does

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[38] For example, in *Crystal Palace* (pp. 26–28, *supra*), the picket line was found to be secondary, though it was at the premises of an employer whose employees were on strike. See, also, pp. 22–26, *supra*.

not define what is "primary," but merely sets forth n the statute the principle which has governed the lecisions of the Board and the courts since Section 3(b)(4)(A) was first inserted in the Act in 1947. Thus, the picketing at gate 3-A would be protected nder the new proviso only if it were primary under he principles developed under the original Section 3(b)(4)(A).

This interpretation of the new proviso is con-rmed, not weakened, by the legislative history. The hanges in the opening part of Section 8(b)(4)—xtending it to "any individual" and eliminating concerted"—were designed to close certain loopholes n the original provision. It had been held that the rovision did not apply to the inducement of indi-iduals not included in the statutory definition of em-loyee, such as railroad employees, nor to the situa-ion where the work stoppage involved only a single mployee rather than a group of employees.[39] The hanges in language were made to bring these cases ithin Section 8(b)(4). However, because this ourt in *Rice Milling* had relied on the term "con-erted" in finding that the picketing there was not anned by the section (n. 35, *supra*), it was feared hat the elimination of that term from the amended rovision might be construed as reversing the *Rice illing* decision and invalidating the type of picket-g involved there. The proviso was inserted to in-ire that the deletion of "concerted" would not be viewed. Thus, the Conference Report (I *Leg.*

[39] See Aaron, *The Labor-Management Reporting and Dis-sure Act of 1959*, 73 Harv. L. Rev. 1086, 1113 (1960).

History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959), p. 942, H.R. Rep. No. 1147, 86th Cong., 1st Sess., 38) states:

> The purpose of this provision is to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the *limitations* on picketing at the site of a primary labor dispute that are in existing law. See, for example, *NLRB* v. *Denver Building and Construction Trades Council, et al.* (341 U.S. 675 (1951)); *Brotherhood of Painters, Decorators and Paperhangers, etc., and Pittsburgh Plate Glass Co.* (110 NLRB 455 (1954)); *Moore Drydock Co.* (81 NLRM 1108); *Washington Coca Cola Bottling Works, Inc.* (107 NLRB 233 (1953)).[40] [Emphasis added.]

The cases cited involve common work situations, two of them (*Denver* and *Washington Coca Cola*) instances where the object of the picketing was found to be secondary.

3. Petitioner relies heavily (Br. 83–86) upon two courts of appeals' decisions, *Local 618, Automotive Employees Union (Incorporated Oil Co.)* v. *National Labor Relations Board,* 249 F. 2d 332 (C.A. 8) and *Seafarers International Union (Salt Dome Production Co.)* v. *National Labor Relations Board,* 265 F. 2d 585 (C.A.D.C.). Both are distinguishable on their facts and illustrate the proposition that the problem is

[40] The citation of *Moore Dry Dock* is erroneous and should read 92 NLRB 547; the citation of *Washington Coca Cola* should read 107 NLRB 299.

not one which can be met by generalities but, rather, one which requires, in each instance, a particularized determination.

In *Incorporated Oil,* as here, the union picketed the primary employer's premises at a time when the employees of secondary employers were at work there. However, unlike this case, the only circumstance suggesting a calculated endeavor by the union to enmesh the secondary employer in the dispute was the fact that it continued to picket even after the primary employees had temporarily been removed from the premises. On the basis of this fact alone, the Board concluded that lawful primary picketing had been converted into illegal secondary activity and banned all picketing at the primary premises. The Eighth Circuit held, however, that this conclusion was not warranted—that, in the circumstances shown, the temporary removal of the primary employees was not sufficient to destroy the primary character of the picketing. This view plainly would not preclude a contrary conclusion on the different facts here, which show that the union, although afforded an adequate opportunity to engage in primary picketing at other gates on the premises, deliberately extended its picketing and other activities to a gate used only by neutral employees. See *National Labor Relations Board* v. *International Hod Carriers, Local 1140* (C.A. 8), No. 16,538, decided December 22, 1960, 47 LRRM 2345, 2348, explaining the limited scope of the court's earlier ruling in *Incorporated Oil.*

Similarly, *Salt Dome* was a case in which the onl evidence of secondary object was the fact that th picketing, which occurred at the dock where the pri mary employer's ship was undergoing repair, con tinued after the primary employer had removed hi employees from the ship. The court of appeals con cluded that this fact was not sufficient to override th other evidence in the record which revealed a carefu effort to confine the picketing to the primary em ployer. As the court explained, in distinguishin *Salt Dome* in its opinion in this case (R. 198–199):

> There, however, the pickets (1) identified them selves specifically as striking only their primar employer, (2) proclaimed by signs clearly show ing that they had no dispute with the secondar employer, (3) distributed leaflets which ex plained in detail not only their own purpos and the reason picketing was conducted at th particular location, but especially excluded th secondary employer and its employees. More over, the primary employer had placed its shi in the secondary employer's yards and onl thereafter were its employees withdrawn; th ship had no other berth at which the union' organizational efforts might be publicized; an the vessel normally was at sea, months on end with its crew shifts rotated and transporte back and forth by helicopter. The operation as conducted by the primary employer not onl had precluded the possibility of picketing th ship directly, but as evidence of the employer'

[41] Two members of the panel which decided this case (Judge Danaher and Prettyman) were also on the panel which de cided *Salt Dome*.

> purpose, the primary employer during the night placed a crew aboard the vessel and towed it away. Such circumstances and such conduct, we concluded, made it clear that the union intended—not to shut down the neutral's operations, but to conduct lawful strike activities against the primary employer. * * *

4. Finally, we submit that the Board's accommodation between the conflicting interests in the situation presented here is not impaired by the circumstance that a distinction is drawn between the types of secondary employers who do business with the primary employer. Petitioner asserts that it is anomalous to permit the union to take direct steps to induce the deliveryman not to cross a picket line at the primary employer's plant, but require it to be more circumspect in relation to the employees of contractors working on the primary premises in a regular manner (see Pet. Br. 98–99; *Amici* Br. 24–25). There is, however, a persuasive reason for drawing that line—as pointed out above, picketing focused upon neutral employees who work steadily at the site of the dispute is fraught with far more serious and damaging consequences for neutral employers.

Nor is the distinction drawn by the Board invalidated by the fact that in particular cases it may be difficult to determine in which category a particular neutral employer falls (see Pet. Br. 99). As this Court has observed (*10 East 40th St. Co.* v. *Callus*, 325 U.S. 578, 584):

> * * * when lines have to be drawn they are bound to appear arbitrary when judged solely

by bordering cases. * * * Lines are not wor
for being narrow if they are drawn on ration
considerations. * * *"

In sum, here, as in *Denver*, the Board's decisi
should be sustained on the ground that it represen
a reasonable accommodation of "the dual congre
sional objectives of preserving the right of labo
organizations to bring pressure to bear on offendi
employers in primary labor disputes and of shieldi
unoffending employers and others from pressures i
controversies not their own" (341 U.S. 675, 692). Th
determination as to how, in particular circumstance
these objectives may be reasonably accommodated
one which cannot be derived by deduction from th
statute. It calls for expert administrative judgmen
Cf. *Republic Aviation Corp.* v. *National Labor Rel*
tions Board, 324 U.S. 793; *Brooks* v. *National Labo*
Relations Board, 348 U.S. 96; *National Labor Rel*
tions Board v. *Truck Drivers Local Union No. 44*
353 U.S. 87. Since the Board's conclusion reflec

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[42] There is no warrant for the fears (*Amici* Br. 24–25, 20–2
that the Board's decision in this case would result in maki
every industrial plant a "common situs" and permit an ea
means of "strike-breaking." The mere fact that a neutral em
ployee comes to the plant to perform work is not sufficient
bring into play the rule of this case; it must be established fu
ther that the neutral employer is at the plant for such a lo
and continuous period that it has in effect become a regul
work place for his employees. Moreover, if a struck prima
employer were to bring in a "neutral" employer merely for th
purpose of doing work which his own employees would ha
done but for the strike, it would appear that the union's full pre
sure could be exerted against the "neutral" under the "ally
doctrine (see n. 34, *supra*).

"administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the * * * facts," it represents "an allowable judgment which [the courts] cannot disturb." *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194, 209.

CONCLUSION

The judgment of the court of appeals enforcing the Board's order should be affirmed.

Respectfully submitted.

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APPENDIX

A. The relevant provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. 151, *et seq.*), read as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person; * * * *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

B. The relevant amendments to the National Labor Relations Act made by the Labor-Management Re-

porting and Disclosure Act of 1959 (73 Stat. 519, 542, 29 U.S.C. 158, Supp. I, are as follows:

SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *. *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act * * *.

* * * * *

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